

Internet Intermediary (ISP) Liability for Contributory Copyright Infringement in USA and India: Lack of Uniformity as a Trade Barrier

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With the internet today transcending all national boundaries, the protection of IP and penalising its infringement over the 'world-wide-web' has become even more difficult, given the territorial nature of the grant of the intellectual property right. Moreover, while hosting, routing, and linking to these 'infringing material harbouring' - sites or services, internet service providers (ISPs) themselves become vulnerable to charges of copyright infringement. The law in the US has since long, been very strict against ISPs for contributory/ secondary copyright infringement. However, India has only recently enacted a legal provision dealing with ISPs. The lack of it has been one of the main reasons for delay in the Indo-US free trade agreement. Although, India has not ratified the WIPO internet treaties, and hence not obligated to have an enforceable ISP liability law, India's 2012 Copyright Amendment Act read together with Sections 79 and 81 of the Information Technology Act and the May 2011 Guidelines for Internet Intermediaries constitute comprehensive legal provisions to fix ISP liability. This paper seeks to highlight the salient features of the ISP liability laws in India and the US and discuss how, even with the new law, differences still remain, leading to continued trade-relation barriers.

Keywords: ISP, internet intermediary, secondary infringement, safe harbour, DMCA, notice and take down, red-flag

With the internet assuming an almost supra-human entity in today's world, now, more than ever before, practically anyone can influence the duplication and dissemination of information around the world. Access to digital reproductions, often infringing, attracts traffic to specific service providers.¹

In hosting, routing, and linking to such sites or services, internet service providers (ISPs) themselves become susceptible to charges of copyright infringement.² Thus, effective copyright law requires balancing of rights and responsibilities of ISPs with regard to copyrighted material that flows through their networks.

In 1998, the United States ratified the WIPO Internet Treaties³ by enacting the Digital Millennium Copyright Act (DMCA).⁴ Under Title II of the DMCA⁵, ISPs can avoid liability for copyright infringement by its subscriber(s) by following the notice and take-down procedures as detailed therein. On the other hand India, has not till date signed either of the treaties, in spite of calls from the WIPO for signature⁶ and given its large entertainment industry. Nonetheless, as a signatory to the TRIPS agreement⁷

and a WTO Member country, it has introduced ISP liability provisions under its Copyright Act 1957 (ref. 8) [amended 2012]⁹ and the Information Technology (IT) Act, 2000 (ref. 10) [amended 2008]¹¹ and the 2011 Rules framed thereunder.¹² It is interesting to see how this lack of harmonisation of enforcement provisions influences exchange of information between the two countries and whether it acts as a barrier to trade between them.

International Law on Online Infringement and Enforcement

The question of who should be liable for copyright infringement that takes place online has been a cause of concern in internet communities and is one raised due to the nature of networks. Infringement liability could arise if the service provider itself is found to have engaged in unauthorized acts of reproduction or communication to the public, or if it is held as a contributor in the act of another (say, a subscriber). The liability issue has significant international implications because the internet is without borders with global access. Thus, arguments have been advanced for legal regimes to be interoperable if global networks and electronic commerce are to develop smoothly.¹³

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The TRIPS Agreement

The TRIPS Agreement is a minimum standards agreement. It leaves Members free to provide more extensive protection of intellectual property if they so wish--for purely domestic reasons or because they have concluded international agreements to this effect (Article 1.1). Articles 41-61 (Part III) provide for the minimum standards that Member States must implement for effective action against infringements. Matthijs Geuze, who served as Secretary to the TRIPS Council at the WTO, suggested that the general enforcement obligations of Article 41 of TRIPS can be summarized in six 'performance standards'¹⁴:

(i) enforcement procedures to permit effective action against infringement; (ii) expeditious remedies to prevent infringements; (iii) deterrence to further infringements; (iv) enforcement procedures that are not unreasonably complicated; (v) enforcement procedures that are not unreasonably costly; (vi) time limits that do not cause unwarranted delays or are not unreasonably fast.

Thus, these provisions have two basic objectives; one to ensure that effective means of enforcement are available to right-holders and the second to ensure that enforcement procedures are applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.¹⁵

The WIPO Internet Treaties

The WIPO in 1996 adopted the 'WIPO internet treaties' (WIPO Copyright Treaty-WCT and WIPO Performances and Phonogram Treaty-WPPT). During the Diplomatic Conference, the issue of unauthorised communication over the internet was intensely debated. The ultimate result was that the treaties are essentially neutral on the subject, with the issue of liability left to the national legislation to determine. Article 8 of the WCT (and corresponding Articles 8 and 15 of the WPPT); talk of the exclusive rights of the owner to 'communicate' or 'distribute' their work. However, an agreed statement to the article, provides that: "[i]t is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention."¹⁶ This statement clarifies that the mere provision of wires used to communicate, for example, does not constitute an act of communication. The Article itself includes communication through wireless means. But the statement is limited in its

application; it does not specifically cover or elucidate a number of other activities that service providers may engage in, and does not deal with concept of liability for contributing to the infringement of another.¹³ Thus, activities like routing and re-routing information, harbouring infringing information, providing connections for digital transmissions and online communications, etc., are not explicitly addressed within the WCT and WPPT.

Since certain specific types of infringement of rights on the internet do not find specific mention in the international regime, it gives wide discretion to the national authorities to enact substantive provisions, thereby allowing some gaps in the quest for harmonisation. However, the enforcement obligations in TRIPS, and the WIPO internet treaties, once incorporated into national legislations upon ratification, have provided a comprehensive foundation for the development of procedures and remedies necessary for effective enforcement against the kinds of infringement that appear over the cyber environment as well as safeguards against ISP liability.¹⁷ These international instruments lay down minimum standards, and at the same time the ratifying countries are free to adopt higher standards (TRIPS plus provisions). Nonetheless, since USA is always perceived as the largest fish in the pond, any nation hoping for trade relations with the country, is expected to meet its version of the 'TRIPS plus' regime, or find themselves in USA's Special 301 'Priority watch list'.¹⁸

US Law: The DMCA 'Notice and Take-Down' and 'Safe-Harbour' Provisions

The DMCA defines a 'service provider' in two ways, where these apply to different parts of Section 512 (ref. 19). This broad definition is deliberate to include universities and other institutions which provide internet access to their students, etc. [17 USC §512(e)]. Moreover, the intention was to include the traditional ISPs as well as providers of new services as seen today.²⁰

The ISPs are eligible for the benefits of the 'safe harbour' provision, if they meet two preliminary requirements.²¹ Though 'seemingly innocuous', the Section 512(i) eligibility requirements have become a point of contention in several cases.²² It further creates four safe harbour provisions that indemnify ISPs from any copyright infringement liability and insulates them from damages. The four sub-parts of the section identify distinct functions that an ISP may

perform and provides for function-specific protection²³ as follows:

(i) Where the ISPs function as ‘conduits for information’²⁴ (‘transitory digital network communications’) - no monetary liability, only injunctive relief. This safe harbour will not be available to a service provider that initiates, selects, or modifies the content of a transmission, or stores it on a system in a way that its content becomes generally accessible to third parties.²⁵

(ii) Caching [17 USC §512(b)] - System caching refers to the process by which ISPs temporarily ‘[store] material on a system or network,’ in order to ‘reduce network congestion generally’ and delays to popular sites.²⁶ The transmission must be initiated by a third party, transmitted through the system to a second user, and stored via automatic processes. However, unlike protection for transitory communications, this subsection only limits liability for those service providers who, upon notification, ‘[respond] expeditiously to remove, or disable access to, the material that is claimed to be infringing’ [17 USC §512(b)(2)(E)].

(iii) Information residing on systems or networks at the direction of users²⁷ – limitation of liability for ‘innocent’ and unintended or uninformed, storage of infringing information. This provision protects those ISPs that receive no financial benefit that can be ‘directly attributable to the infringing activity,’ where the provider has neither the right nor ability to control the activity and where, if properly notified, the ISP suppresses access to the infringing content. However, those ISPs that possess knowledge of infringing information being hosted on their pages, and with such constructive or actual notice, do not take up the task of disabling access to such content; are not protected under this sub-provision. Hence, the ‘knowledge’ element becomes material.

(iv) Referral or linking to infringing material (information location tools) [17 USC §512(d)] – no monetary liability for referring or linking users to an online location that contains infringing material by using information location tools (e.g.: a directory, index, reference, pointer, or hypertext link), provided that the service provider does not have actual knowledge; is not aware of facts or circumstances from which infringing activity is apparent; does not receive a financial benefit; and, if properly notified of the infringing activity, or upon otherwise obtaining knowledge or awareness of the infringement,

expeditiously removes such infringing content. Thus again, the ‘knowledge’ element is material. Once in possession of requisite knowledge, through appropriate ‘notice’ the ISP must necessarily ‘take down’ the offending/disparaging/infringing content, to be protected under the safe-harbour provision.

Section 512 in Practice

Earlier case-law jurisprudence

One of the earliest cases to address the issue of ISP liability for infringement was decided by the US District Court in 1993, prior to the DMCA.²⁸ In *Frena*, the liability of a bulletin board service (BBS) operator for ‘public display’ was in question. Frena operated a bulletin board on which subscribers could upload and download copies of photos from Playboy magazine. While Frena claimed that its subscribers were the ones linking to the photos on the BB and that it was unaware that the said activity amounted to infringement, the court was unimpressed by Frena’s claims. However the issue of whether the liability for display of photographs in dispute, was of the defendant, or whether it was the subscribers’ activity that would make the defendant liable only upon satisfaction of certain other additional elements, for vicarious liability or contributory infringement, remained unaddressed, given that the court only granted a summary judgment in favour of Playboy, and nothing really was discussed on merits.²⁹

This lack of clarity from the summary judgment in *Frena* was taken up, criticised and sought to be rectified a few years later by the District Court for the southern district of California in *Netcom*.³⁰ In this case, files containing copyrighted materials owned by the Church of Scientology were publicised on the internet by Dennis Erlich, through an online BBS called ‘support.com’. Netcom helped the BBS to access the internet. The plaintiff (Religious Technology Center, RTC) argued that the defendant Netcom was directly, contributorily, and vicariously liable for copyright infringement. The district court concluded that RTC’s claims of direct and vicarious infringement failed, but genuine issues of fact precluded summary judgment on contributory liability and fair use. However, the court also made a finding that there was no direct monetary advantage or reward to either Netcom or the BBS for the posting of infringing materials. Nonetheless, the Court found that Netcom may be liable to the Church under the ‘theory of contributory infringement’ by having materially contributed to the infringement by the user.

This judgment formed the standard followed in the DMCA as well as in many decisions that followed³¹, thus discrediting the finding in *Frena* that a BBS, merely supplying a service, also constituted the supply of a ‘product’ containing unauthorised copies of a copyrighted work.³² Thus, direct and even vicarious liability came to be denied as a matter of law, and the only issue that remained was that of contributory infringement and ‘knowledge’ of the ISP.³³

Influence of Earlier Cases on Legislation

Thus, the present law stems from the *Netcom* reasoning that even though copyright is a strict liability statute, there should be some element of volition or causation, which is lacking where a defendant’s system is merely used to create a copy by the third party. When it is the subscriber who is directly liable, it is senseless to hold other parties like the ISPs, whose involvement is merely providing internet facilities, liable for the actions of the subscriber.³⁴

Present Standards and Recent Case Laws

However, of late, the courts have been going back and forth a lot in reaching a clear decision on ISP liability, especially in light of increase in the number of law suits filed by copyright owners. In 2012, the appeals court for the 2nd Circuit in *Viacom v You Tube*,³⁵ handed down a controversial judgment in favour of Viacom, the English Premier League and others, finding that “any reasonable jury would find that [You Tube] had actual knowledge or awareness of specific infringing activity on its website.”³⁵ However, the Court said it was unclear whether YouTube had ‘red flag awareness’ of specific infringement. It said the lower court should consider whether YouTube showed ‘wilful blindness’ in letting copyrighted videos remain on its website,³⁶ and thus the case was re-opened to consider whether the ISP was entitled to claim the Section 512 safe-harbour.³⁷

The *Viacom v You Tube* decision was contrary to the opinion handed down by the 9th Circuit Court of Appeals in December 2011 in *UMG v Shelter Capital*.³⁸ UMG owned the copyright licences to many songs. Despite Shelter Capital Partners’ efforts to check the content of the virtual storage it provided, to ensure that the content did not violate any copyright licences; some of the videos that were uploaded, violated UMG’s copyright licences. The

court in 2011, reasoned first that the two knowledge-based exceptions to the DMCA – the ‘actual knowledge’ of infringement and the ‘awareness of facts or circumstances from which infringing activity is apparent’ (the ‘red flag’ exception) – both required knowledge of specific infringements, as opposed to generalized knowledge. Second, the original holding reasoned that since the defendant lacked item-specific knowledge of the infringing videos, it also could not have had the ‘right and ability to control’ the infringing activity, such that defendant could not be disqualified from the DMCA under the Section 512(c)(1)(B) ‘financial benefit’ and ‘control’ exception either.³⁹

The theory regarding ‘control’ was the exact reasoning the 2nd Circuit reversed as incorrect when it decided in *Viacom*.⁴⁰ After this decision, the Ninth Circuit called for additional briefing – leading to its superseding opinion in *UMG v Shelter Capital (II)* which was handed down on 14 March 2013 (ref. 41). It seems a first of its kind case, where appellate court changed its opinion after having been persuaded by the reasoning in another circuit’s opinion.⁴² The opinion now holds that a service provider has the requisite ‘control’ as long as it has ‘substantial influence’ on the activities of users, irrespective of whether it also has knowledge.⁴³ It proposes two ways that this standard can be met: either by having ‘high levels of control over activities by users,’ or by ‘purposeful conduct’.⁴³ Therefore, even though the Ninth Circuit finding was based on Veoh’s lack of control by itself, it did give a revised version of the safe harbour standard in Section 512(c)(1)(B). When read together with the 2nd Circuit’s holding in *Viacom*, the rule then became clear, that when a service provider intentionally induces infringement by its users and subscriber, such ISP shall not be eligible for the DMCA’s safe harbour protection.⁴⁴ Another important finding was its articulation of the difference between ‘actual’ knowledge [17 USC §512(c) (1)(A)(i)] and ‘red flag’ awareness [17 USC §512(c)(1)(A)(ii)] as the difference between subjective and objective awareness.⁴³ The question that remained open was whether awareness of infringement of one owner’s works can also disqualify an ISP from protection for other infringements.⁴⁵

After the *UMG II* decision however, in April 2013, the district court for the Southern District of New York again granted a summary judgment in

YouTube's favour.⁴⁶ Judge Louis L Stanton held that YouTube did not have any 'actual knowledge' of any definite infringements and neither was it 'willfully blind' to any such specific infringements. He also held that YouTube did not have the 'right and ability to control' infringing activity for the purposes of Section 512(c)(1)(B), and that YouTube's conversion of clips for viewing on cell phones etc., is protected by the safe harbour provisions of the DMCA.⁴⁷

Viacom had decided to appeal against this decision to the 2nd US Circuit Court of Appeals in New York, and oral arguments had been scheduled for 24 March 2014. However, on 18 March 2014, less than a week before scheduled date of first hearings; it was reported that Google and Viacom had settled the seven year long dispute. "This settlement reflects the growing collaborative dialogue between our two companies on important opportunities, and we look forward to working more closely together," Google and Viacom were quoted to have said in a joint statement.⁴⁸ Nonetheless, Judge Stanton's view that – "YouTube did not have the "right and ability to control" infringing activity because "there is no evidence that YouTube induced its users to submit infringing videos, provided users with detailed instructions about what content to upload or edited their content, pre-screened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users to a point where it might be said to have participated in their activity," still continues to shed light on how to gauge the Section 512(c)(1)(B) threshold.

Indian Law on ISP Liability for Copyright Infringement

Applicable Statutes and Controversy in Interpretation

The old 1957 Copyright Act, enacted prior to the concept of internet, nonetheless provided for the concept of secondary liability for copyright infringement. These provisions, coupled with the specific ISP liability provisions⁴⁹ present in the IT Act, 2000 (as amended in 2008), acted as the basis for the 'safe harbour' for ISPs until the IT (Intermediary guidelines) Rules 2011, i.e., 2011 Guidelines were enacted.

It is interesting to note that the governing law applies to 'intermediaries', defined under Section 2(w) of the IT Act as "intermediary with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any

service with respect to that message". This is an 'all-encompassing' definition, wherein telecom service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafés etc., would all fall within the scope of the exemption under Section 79 the IT Act.

According to Section 81 of the Act, it had an overriding effect over other acts in force, provided that it did not prevent anyone from exercising their rights under the Copyright Act or Patents Act.

The 2011 Guidelines have a very wide scope, in that, the safe-harbour therein extends not only to copyright infringement (to which, incidentally, Section 79 of the IT Act does not, by virtue of *Proviso* to Section 81) but also to all other forms of IP rights infringement, provided that the ISP observes the requisite Section 79 notice and takedown procedures and 'due-diligence'⁵⁰ as entailed in the guidelines. The 2011 Guidelines, function in the manner that the intermediaries are required to impose a set of rules and regulations on users that include a prohibition on posting infringing content online. Any person aggrieved by allegedly infringing content on the internet, is therefore entitled to ask the internet intermediary to take such material down. However, these guidelines do not provide for the creator of the content to respond to this complaint. They do not even provide for the intermediaries to inform the user who posted the content regarding the complaint. Further, the intermediaries which do not comply with a take-down notice lose the protection of the 'safe-harbour' so created. Thus, the safe harbour protection available to intermediaries under Section 79, is conditional upon their observing due diligence in accordance with Rule 3 of the 2011 Guidelines.

As has been rightly pointed out by Saikia that "The fact that both Sections 79 and 81 contain non obstante clauses has made it extremely difficult to interpret the two Sections harmoniously, to pinpoint which Section supersedes the other, and to understand what the law on the subject is"⁵¹, and it is due to this controversy over applicability of Section 79 to cases of copyright infringement, that there was a move to amend and introduce exceptions within the copyright law itself.⁵²

Judicial Interpretation of the Old Applicable Law and Emergence of New Statute

The controversy is best illustrated by the two cases filed by Super Cassettes ('SCIL') against Yahoo⁵³ and MySpace.⁵⁴ On 30 May 2008, the Delhi HC issued a

notice to Yahoo Inc and its Indian subsidiary Yahoo Web Services (India) Pvt Ltd on a suit filed by SCIL, owner of the largest Indian music label 'T-Series' for infringement of their copyright caused by unlicensed streaming of SCIL's copyright works on Yahoo's portal video.yahoo.com.⁵³ In the *MySpace* decision, the single judge of Delhi HC seemed entirely unsympathetic to ISPs and went to the extent of saying that intermediaries should screen all user generated content to check for infringement prior to making the content available online. The court opined thus:

"Fourthly, if there is any due diligence which has to be exercised in the event of absence of any provision under the Act, the said due diligence must be present at the time of infringement and not when the infringement has already occurred so that the infringement can be prevented at the threshold and not when the same has already occurred.... The post infringement measures like the ones informed by the defendants which are in compliance of US statute may hold good in US due to the legislative measure but the same are not operative in India... The defendants have sufficient means to modify the work by taking licenses from the users, adding advertisements to the works of the plaintiff. Consequently, the effective means for pre infringement enquires are also necessarily have to be performed by the defendants only..." [para 85 (d)]

Even though this decision seems to have set the trend towards requiring due diligence /content clearance to be conducted by intermediaries regardless of practical feasibility,⁵⁵ it would appear that the 2012 amendments to the Copyright Act have significantly dampened the development of this possible trend through the incorporation of two new provisions in the statute.

The Copyright Amendment Act 2012 and Provisions on ISP Liability

There are two new provisions, Section 52(1)(b) and 52(1)(c), which provide some degree of protection to 'transient or incidental' storage of a work or performance.

Section 52(1)(b) allows for "the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public".

Section 52(1)(c) allows for "transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration,

where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy".

Section 52(1)(b) and (c) as amended therefore, refer to 'how' the storage of content is effected, and 'why' the storage of content is effected, respectively. Section 52(1)(c) thus seems designed to protect intermediaries from secondary infringement and not from acts of primary infringement - exception to copyright infringement will only apply if the intermediary has no good reason to believe that the relevant content is infringing. Section 52(1)(c) also contains a 'notice and take down' procedure which requires taking down infringing content for a period of twenty-one days upon receipt of a complaint.

This 'safe harbour' seems structurally similar to that in the DMCA, but intermediaries in India have been given less time in which to take down infringing material if they want to be protected by the safe harbour.⁵⁶ Another interesting fact is that though the Intermediary Rules do not contemplate a 're-upload', upon failure to demonstrate to that the content was in fact infringing, under a harmonious reading of the copyright statute and the Intermediary Rules, it would be possible for an intermediary to re-upload non-infringing content after the completion of the twenty-one day period contemplated by the amended Section 52 (ref. 55).

However, unless a judicial interpretation on the new law is available, any attempts at 'harmonious construction' of the copyright and the IT regimes as they exist today, is only for academic interests. And an intermediary may be found to have committed infringement with reference to forms of intellectual property other than copyright, particularly in light of the prevailing uncertainty relating to the interaction between Sections 79 and 81 of the IT Act.⁵⁵

Reconciling the Differences in US and Indian Law – Lack of Harmonisation a Barrier to Trade?

The internet, as mentioned earlier, is a medium without borders. Thus, any infringing activity on the internet, even though rooted in one country, does have a spill-over effect into other jurisdictions where there is access to the material. Whereas in previous generations, trade agreements dealt in hard goods that could be accounted for and of which value was readily determined; the commodities of today are digital and informational.⁵⁷ These intangible 'goods'

are harder to track and almost impossible to value, and thus infringement on the 'world wide web' is of serious concern to rights holders. The TRIPS Agreement, lays down the international minimum standard for enforcement procedures to not be barriers to legitimate trade.⁵⁸ What trade is 'legitimate' is understood differently by different nations. Further, since TRIPS leaves wide discretion with Members to enact enforcement legislations, most Members adopt 'TRIPS plus' provisions.

The United States is the hub for the entertainment industry that supplies content to users worldwide. Thus, its law on IP enforcement, as an 'IP exporting' country is based on concerns over increasing trade in and access to 'counterfeits' as it destroys markets for the originals and deceives consumers. Entertainment conglomerates and music companies, therefore, find the lack of adequate IP enforcement in markets abroad a key obstacle to international trade in IP protected goods.⁵⁹ On the other hand, 'IP-importing' countries see these laws as 'protectionist'. In a country like India, which has its own expanding entertainment industry, whose produce is very popular worldwide,⁶⁰ a strong IP enforcement law is desirable. However, it is only very recently, that it has amended its ISP liability and online copyright infringement enforcement laws. The international IP enforcement rules are still viewed as 'non-tariff' barriers to trade for exports from developing countries, when they are more stringent than their local counterparts.

On the flipside, an equally strong lobby is formed by ISPs like Google and its subsidiaries, AOL, Amazon, eBay, etc. These have continually sought wider ISP liability exceptions in copyright laws, and thus the DMCA is framed like a compromise between the feuding groups. Since these ISPs are rooted mostly in the US and other developed nations, and they harbour content created by the Indian entertainment industry on the world wide web, a claim of secondary infringement against these ISPs dealt with under the Indian law till date has not been very favourable towards them, as seen in the *MySpace* decision. Thus, as of now, it seems that for rights holders, India is a more desirable forum to sue ISPs, whereas for ISPs rooted out of the US, a more desirable alternative to proceedings brought in India (by rights holders based out of the US and where access is available in India)⁶¹ would be to claim *forum non-conveniens* and seek trial in the US.⁶² What remains to be seen is how the new 2012 amendment is

reconciled with the IT Act's existing provisions. Will the Indian courts go in the direction of the decision in *UMG II*? Or will there be a new interpretation to *MySpace*? Since the *Yahoo* decision is pending, it will be interesting to see how the Delhi HC rules on the matter in light of the amendments, even though the old law applies.

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- 19 Title 17 USC § 512(k) definitions- "(1) Service provider.- (A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received. (B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A)."
- 20 Joseph B G & Wasylik D P, in *Practising Law Institute- Patents, Copyrights, Trademarks and Literary Property Course Handbook Series*, 2003, 541 cited in Kahandawaarachchi T, Liability of service providers for third party online copyright infringement: A study of US and Indian laws, *Journal of Intellectual Property Rights*, 12 (6) (2007) 553.
- 21 Title 17 USC § 512(i): "(1) Accommodation of technology — The limitations on liability established by this section shall apply to a service provider only if the service provider— (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and (B) accommodates and does not interfere with standard technical measures."
- 22 For a detailed discussion, refer Bretan J, Harboring doubts about the efficacy of § 512 immunity under the DMCA, *Berkeley Technology Law Journal*, 18 (2003) 43.
- 23 Hayes D L, Copyright liability of online service providers, (Part 2), *The Computer & Internet Lawyer*, 19 (11) (2002) 15.
- 24 *Religious Technology Center v Netcom On-Line Communication Servs*, 907 F. Supp. 1361, 1376 (N.D. Cal. 1995) [§512(a) is a codification of the decision where the court refused to impose liability on Netcom under a theory of vicarious liability]; See generally Hayes D L, Copyright liability of online service providers, (Part 2), *The Computer & Internet Lawyer*, 19 (11) (2002) 22-25.
- 25 Title 17 USC §512(a): "(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and (5) the material is transmitted through the system or network without modification of its content."
- 26 Nimmer M B & Nimmer D, *Nimmer on Copyright*, Vol 3 (Matthew Bender, NY), 2006, S.12B.03[A] 'Eligible storage'.
- 27 Title 17 USC §512(c); See also Bretan J, Harboring doubts about the efficacy of § 512 immunity under the DMCA, *Berkeley Technology Law Journal*, 18 (2003) 50.
- 28 *Playboy Enterprises Inc v Frena*, 839 F. Supp. 1552 (M.D. Fla., 1993).
- 29 Nimmer M B & Nimmer D, *Nimmer on Copyright*, Vol 3 (Matthew Bender, NY), 2006, S.12B.01[A][1].
- 30 *Religious Technology Center v Netcom On-Line Communication Services Inc*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995) ('Netcom').
- 31 *Costar Group Inc v Loopnet Inc*, 164 F. Supp. 2d. 688, 704 (D. Md. 2001), affirmed by 373 F. 3D. 544, 555 (4th Cir, 2004); *Harlan Ellison v Stephen Robertson, et al.*, 189 F. Supp.2d 1051, (C. Dist. Cal., 2002), affirmed in part, reversed in part, remanded by 357 F. 3d 1072 (9th Cir, 2004).
- 32 *Playboy Enterprises Inc v Frena*, 839 F. Supp. 1552 (M.D. Fla., 1993) at p. 1556.
- 33 Nimmer M B & Nimmer D, *Nimmer on Copyright*, Vol 3 (Matthew Bender, NY), 2006, S.12B.01[A][1], citing *Harlan Ellison v Stephen Robertson, et al.*, 189 F. Supp.2d 1051, 1057-60.

- 34 Kahandawaarachchi T, Liability of service providers for third party online copyright infringement: A study of US and Indian laws, *Journal of Intellectual Property Rights*, 12 (6) (2007) 556.
- 35 *Viacom International Inc v YouTube Inc*, 676 F.3d 19 (2d Cir, 2012), at 9, 22.
- 36 Stempel J & Adegoke Y, *Viacom wins reversal in landmark YouTube case*, 5 April 2012, Reuters, U.S.A., <http://www.reuters.com/article/2012/04/05/net-us-google-viacom-idUSBRE8340RY20120405> (2 May 2014).
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- 38 *UMG Recordings Inc v Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir, 2011).
- 39 *UMG Recordings Inc v Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir, 2011), at 1038-40, 1041-45.
- 40 *Viacom International Inc v YouTube Inc*, 676 F.3d 19 (2d Cir, 2012), at 36-38; See generally Platzer L, Revised UMG v. Veoh decision includes silver linings for copyright plaintiffs, 22 March 2013, http://www.copyrightalliance.org/2013/03/revised_umg_v_veoh_decision_includes_silver_linings_copyright_plaintiffs#.UWBNp5NTCuI.
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- 43 *UMG Recordings v Shelter Capital Partners*, No 09-55902, 2013 WL 1092793 (9th Cir, 14 March 2013) at p. 39-40, 49.
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- 45 *UMG Recordings v Shelter Capital Partners*, No 09-55902, 2013 WL 1092793 (9th Cir, 14 March 2013) at footnote 14, p. 38, "We therefore do not consider whether Veoh's awareness of apparent infringement of Disney's copyrights over movies and television shows would affect the availability of the S. 512(c) safe harbor with regard to UMG's claims that Veoh hosted unauthorized UMG music videos."
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- 47 Szamel P & Fishwick L, District courts grants summary judgment to YouTube in Viacom v Youtube (Again), 2 May 2013, <http://jolt.law.harvard.edu/digest/copyright/district-court-grants-summary-judgment-to-youtube-in-viacom-v-youtube-again>.
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- 50 Rule 3 – "Due diligence to be observed by intermediary — The intermediary shall observe following due diligence while discharging his duties, namely : — (1) The intermediary shall publish the rules and regulations, privacy policy and user agreement for access-or usage of the intermediary's computer resource by any person. (2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that: (d) infringes any patent, trademark, copyright or other proprietary rights... (3)The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub-rule (2): provided that the following actions by an intermediary shall not amount to hosting, publishing, editing or storing of any such information as specified in sub-rule: (2) — (a) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource; (b) removal of access to any information, data or communication link by an intermediary after such information, data or communication link comes to the actual knowledge of a person authorised by the intermediary pursuant to any order or direction as per the provisions of the Act;" (4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes, (5) The Intermediary shall inform its users that in case of non-compliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource, the Intermediary has the right to immediately terminate the access or usage lights of the users to the computer resource of Intermediary and remove noncompliant information..."
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